

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Revision of the Commission's Rules to	)	CC Docket No. 94-102
Ensure Compatibility With Enhanced 911	)	
Emergency Calling Systems	)	
	)	
Amendment of Parts 2 and 25 to Implement	)	IB Docket No. 99-67
the Global Mobile Personal Communications	)	
by Satellite (GMPCS) Memorandum of	)	
Understanding and Arrangements; Petition of	)	
the National Telecommunications and	)	
Information Administration to Amend Part 25	)	
of the Commission's Rules to Establish	)	
Emissions Limits for Mobile and Portable	)	
Earth Stations Operating in the 1610-1600.6	)	
MHz Band	)	
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**COMMENTS OF VIRGIN MOBILE USA, LLC**

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**COMMENTS OF VIRGIN MOBILE USA, LLC**

Virgin Mobile USA, LLC ("VMU"), by its undersigned counsel and pursuant to the Commission's Further Notice of Proposed Rulemaking released December 20, 2002 ("FNPRM"),<sup>1</sup> hereby submits its Comments in the above-captioned proceedings.

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<sup>1</sup> *Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102; *Amendment of Parts 2 and 25 to Implement the Global Mobile Personal Communications by Satellite (GMPCS) Memorandum of Understanding and Arrangement*; *Petition of the National Telecommunications and Information Administration to Amend Part 25 of the Commission's Rules to Establish Emissions Limits for*

## I. INTRODUCTION AND SUMMARY

VMU is a joint venture between Sprint Ventures Inc., an affiliate of Sprint PCS, whose technologically advanced digital wireless network is used by VMU's wireless service,<sup>2</sup> and the Virgin Group, a diversified global conglomerate comprised of over 200 companies – including an international airline, a recording label, and an entertainment superstore – uniformly committed to delivering great quality and value to their customers.

VMU began providing national CMRS in August 2002. VMU's rapid marketplace acceptance demonstrates that its entry into the U.S. wireless market has brought customers great service, value, specialized content, and innovative services welcomed by the youth market.

VMU is firmly committed to ensuring that E911 service is available to all wireless customers. Although not subject to E911 compliance rules, VMU voluntarily filed an initial E911 compliance program in February 2002, before commencing operations, and recently modified its plan to reflect current handset delivery schedules. The revised schedule essentially mirrors that for Tier III facilities-based carriers, with achievement of the final deployment milestone by the December 31, 2005, milestone date applicable to all facilities-based carriers.

VMU's roll-out schedule can serve as a model for the Commission's extension of E911 obligations to non-licensee wireless service providers. In extending E911 obligations to wireless carriers other than commercial mobile radio service ("CMRS") licensees, however, the Commission should, consistent with its *Order to Stay*<sup>3</sup> regarding the obligations of Tier II and

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*Mobile and Portable Earth Stations Operating in the 1610-1660.5 MHz Band*, IB Docket No. 99-67, *Further Notice of Proposed Rulemaking* (rel. Dec. 20, 2002) ("FNPRM"). The filing is made this date because of the Commission's office closing on February 18, 2003. See 47 C.F.R. § 1.4(e)(1).

<sup>2</sup> Sprint PCS has elected a handset-based E911 solution.

<sup>3</sup> *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling System: Phase II Compliance Deadlines for Non-Nationwide CMRS*

Tier III wireless carriers, make clear that the new obligations of these carriers are distinct from those of underlying CMRS licensees and that, for the reasons outlined below, non-licensees' E911 deployment compliance should be evaluated independently from the evaluation of the compliance of their underlying CMRS licensee carriers.

**II. VMU VOLUNTARILY COMPLIED WITH E911 REGULATIONS APPLICABLE TO FACILITIES-BASED WIRELESS CARRIERS BY PROVIDING A DEPLOYMENT SCHEDULE FOR PROVISION OF GPS-ENABLED HANDSETS BEFORE VMU EVEN COMMENCED OPERATIONS.**

VMU is not subject to the Commission's E911 requirements, including the Phase II compliance schedule set forth in 47 C.F.R. § 20.18 of the Commission's rules, because it is not a CMRS licensee. Consistent with VMU's commitment to the public interest in ensuring the availability of E911 capability to its customers, however, VMU voluntarily submitted to the Commission an ambitious schedule for providing Global Positioning System ("GPS")-enabled handsets. VMU submitted its proposal on February 22, 2002, five months before VMU began providing national services, four months before the Commission's *Order to Stay*, and ten months before the Commission first raised the issue of non-licensee compliance with E911 requirements in these proceedings. VMU's proposed compliance schedule is in most aspects more aggressive than the compliance schedules approved by the Commission for Tier III facilities-based carriers.

VMU believes that the public interest requires the extension of E911 obligations to all wireless carriers, not just facilities-based CMRS licensees. As described below, VMU posits that its compliance schedule, similar to that for Tier III carriers, can serve as an appropriate model for the Commission to use in adopting rules mandating E911 compliance by all wireless providers not now subject to E911 compliance.

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*Carriers*, CC Docket No. 94-102, FCC 02-210 (rel. July 26, 2002) ("*Order to Stay*") (granting extensions of certain Phase II deadlines of approximately 7 months and 13 months, respectively, for Tier II and Tier III facilities-based CMRS providers).

**A. VMU's Proposed Compliance Schedule Meets Or Exceeds The Compliance Deadlines Established By The Commission For Tier III Facilities-Based Carriers.**

VMU's voluntary compliance schedule is consistent with and, with respect to selected deadlines, even more ambitious than the compliance schedule imposed by the Commission on Tier III facilities-based wireless carriers in the *Order to Stay*. Under VMU's proposal, VMU will begin providing GPS-enabled handsets in September 2003, with a 95% penetration of location-enabled handsets by December 31, 2005—the same final compliance deadline set forth in Section 20.18 of the Commission's rules and imposed on Tier III facilities-based carriers in the *Order to Stay*. A comparison of VMU's proposal with the Commission's Tier III compliance schedule is set forth below.

<u>Compliance Action</u>	<u>VMU Plan</u>	<u>Tier III Schedule</u>
Begin selling/activating location-enabled handsets	September 23, 2003	September 1, 2003
25% of all new handsets location-enabled	September 30, 2003	November 30, 2003
50% of all new handsets location-enabled	December 31, 2003	May 31, 2004
All new handsets location-enabled	September 30, 2004	November 30, 2004
95% location-enabled handset penetration	December 31, 2005	December 31, 2005

While VMU's proposed date for beginning to sell and activate location-enabled handsets is approximately three weeks later than the Commission's date for Tier III facilities-based carriers, VMU proposes to reach the 25% threshold for all new handsets two months earlier than the date the Commission established for Tier III carriers, and the 50% threshold for all new handsets five months earlier than the Commission-established deadline for Tier III carriers. In

addition, VMU proposes to have all of its new handsets location-enabled two months earlier than the deadline the Commission set for Tier III carriers. Accordingly, VMU has developed and committed to an ambitious schedule that meets or exceeds the Commission-established deadlines for facilities-based carriers even though VMU is not yet subject to any E911 compliance requirements.

**B. A Modified Tier III Compliance Schedule Is Appropriate For Resellers, Such As VMU.**

While there are significant operational differences between non-licensee providers and Tier III facilities-based wireless providers, including that non-licensees' selection of location-based technologies is dependent on that of their respective underlying licensed carrier, the Commission's rationale for a delayed phasing in of the compliance schedule for Tier III carriers is equally applicable to extending E911 regulations to non-licensee providers. In its *Order to Stay* granting an extension of the E911 requirements to Tier II and Tier III facilities-based carriers, the Commission recognized that compliance would create a substantial burden on these carriers.<sup>4</sup> In particular, the Commission noted that "[b]ased on this record, we find that handset vendors and network-based location technology vendors give priority to the larger, nationwide carriers. Nationwide carriers' deployment schedules have created downstream delays for Tier II and III carriers."<sup>5</sup> Like Tier II and Tier III facilities-based carriers, non-licensee providers have less leverage with vendors regarding price and priority for new handsets.<sup>6</sup>

Recognizing the disadvantages that Tier II and Tier III carriers face in acquiring the location technologies, network components, and handsets needed to comply with the

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<sup>4</sup> *Order to Stay*, at ¶¶ 10-11, 20.

<sup>5</sup> *Order to Stay*, at ¶ 11.

<sup>6</sup> *See Order to Stay*, at ¶ 20.

Commission's regulations, the Commission focused first on requiring larger, established carriers (with 95% of the wireless customers)<sup>7</sup> to implement the E911 requirements, permitting Tier II and Tier III carriers a longer transition period. The Commission concluded that "a three-tier approach will ensure the widest availability of Phase II location services for CMRS customers in the shortest period of time."<sup>8</sup> Given that most, if not all, of the Tier I carriers have filed for and received extensions of their compliance deadlines, much of the distinction between phases applicable to the different sized facilities-based carriers has been blurred. Tier I carriers' E911 current implementation schedules are not dissimilar from those the Commission originally set for Tier II and Tier III carriers. For this reason, as well as the special challenges that smaller competitors face in securing compliant handsets, the Tier III schedule is the appropriate model to apply to non-licensed carriers, who would only now become subject to E911 obligations. VMU's voluntary compliance program demonstrates that a schedule essentially tracking the Tier III requirements should be feasible for resellers.<sup>9</sup>

### **C. Consumer Cost Considerations Support a Tier III-Like Schedule.**

In setting compliance schedules, the Commission should recognize the costs to consumers of premature handset replacement. VMU offers pay-as-you-go service, primarily to the youth market. VMU does not subsidize its handsets as heavily as do carriers that require customers to enter into long-term contracts. Many of VMU's consumers enjoy wireless service only because VMU offers affordable service without a credit check qualification. Younger customers require less expensive handsets that they do not replace frequently. Many cannot

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<sup>7</sup> In the *Order to Stay*, the Commission noted that Tier I and Tier II carriers account for nearly 95% of the wireless market. *Order to Stay*, at ¶ 22.

<sup>8</sup> *Order to Stay*, at ¶ 20.

<sup>9</sup> Resellers who use a network employing network-based location technologies are of course tied to the compliance schedule of their underlying carrier.



afford currently available E911-compliant handsets. Indeed, VMU's first E911-compliant handset will be its most expensive model to date.

Therefore, in setting the final milestone date, the Commission should recognize that customer compliance is outside the control of the service provider. Customers may be reluctant, or unable, to replace less expensive handsets with more costly E911-compliant handsets unless the handsets were given away at a substantially reduced price—a practice wholly inconsistent with VMU's affordable service business model. Customers should not have to choose between upgrading their existing service or losing their service entirely.

### **III. NON-LICENSEES' COMPLIANCE MUST BE EVALUATED INDEPENDENTLY OF THAT FOR FACILITIES-BASED CARRIERS, AND AN INTERIM ORDER CONFIRMING THIS SHOULD BE ISSUED IMMEDIATELY.**

The Commission has already, *sua sponte* in CC Docket Nos. 96-45, *et al.*,<sup>10</sup> recognized that even wireless carriers with some common ownership should be considered independent unless they are actually under common control. Specifically, in reviewing the definition of “affiliate” in the *Universal Service Contribution Methodology Order*, the Commission found that its initial definition could have forced competing wireless telecommunications providers that are not otherwise under common control to adopt common universal service revenue reporting policies, an unintended result.<sup>11</sup> Consequently, the Commission concluded that wireless

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<sup>10</sup> See *Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, and 98-170, Order and Order on Reconsideration, FCC 03-20 (rel. Jan. 30, 2003) (“*USF Order on Reconsideration*”).

<sup>11</sup> *USF Order on Reconsideration*, at ¶ 5.

telecommunications carriers would be deemed to affiliated for purposes of universal service revenue reporting only “if one entity (1) directly or indirectly controls or has the power to control another, (2) is directly or indirectly controlled by another, (3) is directly or indirectly controlled by a third party or parties that also controls or has the power to control another, or (4) has an ‘identity of interest’ with another contributor.”<sup>12</sup>

Here, the Commission should explicitly state that where a non-licensee wireless service provider is not under common control (as now defined in CC Docket Nos. 96-45, *et al.*) with the underlying carrier, the compliance of the non-licensee provider is to be considered separately from the evaluation of its underlying carrier’s compliance. Further, the Commission should clear up any confusion among facilities-based licensees regarding whether non-licensees offering services over a licensee’s network must comply with the licensee’s initial compliance schedule, extended compliance schedule, or some other proposed compliance schedule. In particular, the Commission should state that the compliance schedule for non-licensees is distinct from that for their underlying carriers.

**A. Handset Sales of Non-Licensees and Their Underlying Carriers Should Be Counted Separately for Purposes of Determining Compliance with any Implementation Schedule.**

A facilities-based carrier should be required to meet applicable deadlines based solely on its own direct end-user sales. Regardless of the size of a compliance schedule applicable to its underlying carrier, a reseller should be required to meet only a distinct schedule, adopted in this proceeding, similar to that applicable to Tier III facilities-based carriers. To tie the compliance schedule for non-licensee providers to that of its underlying carrier would cause substantial harm to the non-licensee provider and its customers.

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<sup>12</sup> *USF Order on Reconsideration*, at ¶ 6.

For example, VMU has ordered E911-compliant handsets for delivery this spring, the earliest that the manufacturer could make such handsets available to VMU. These handsets will necessarily be more expensive for consumers than the models VMU currently offers. To meet the schedule applicable to its underlying carrier, VMU, which has been in operation only seven months, would have to cancel orders for non-compliant but affordable handsets, return handsets not yet sold, and place new orders for location-enabled handsets. Even if VMU did so, there is no assurance the new orders would be filled in time to meet customers' needs. Further, even if the handsets were available, their higher costs could preclude some would-be customers from obtaining any service, or deter handset replacement by existing customers. Requiring VMU to withdraw existing handsets, cancel current deliveries, and immediately offer only location-enabled handsets would substantially limit customer choice as well as impose unnecessary costs on VMU and its customers.

Each entity should therefore be responsible for ensuring its own compliance with applicable Commission-imposed milestones for handset sales. An E911 requirement that requires or permits facilities-based carriers to include their non-licensed providers' handset sales in their own compliance numbers would give an incentive to facilities-based providers to dictate to non-licensees the types of handsets to sell to subscribers, the prices at which such units could be sold, or other aspects of the non-licensee's customer's operations. Accordingly, any E911 compliance requirements the Commission adopts for carriers other than CMRS licensees should specifically state that the handset sales of each separately-controlled wireless company will be counted individually for purposes of determining that company's compliance with the specific E911 requirements applicable to it.

This approach is consistent with the Commission's practice of monitoring compliance separately for legal entities not under common control. Consistent with the Commission's determination in the *USF Order on Reconsideration*, in those instances where a facilities-based carrier holds some ownership in a non-licensee provider, but does not hold a majority voting interest or otherwise in fact control it, the non-licensee should not be deemed an affiliate of its underlying facilities-based carrier for any purpose in connection with implementation of the Commission's E911 requirements.<sup>13</sup> Specifically, the Commission should clarify that, for purposes of E911 compliance, a non-licensee provider is to be deemed affiliated with an underlying facilities-based carrier only if the facilities-based carrier (1) directly or indirectly controls or has the power to control the non-licensee, (2) is directly or indirectly controlled by the non-licensee, (3) is directly or indirectly controlled by a third party or parties that also controls or has the power to control the non-licensee, or (4) has an 'identity of interest' with the reseller.

**B. A Non-Licensee's Underlying Carrier Should Not Be Given Responsibility for Ensuring the Non-Licensee's Compliance with E911 Requirements.**

VMU shares the Commission's public policy goal of bringing E911 capability to all subscribers and thus believes that all wireless service providers should be subject to E911 requirements. The Commission's rule should, however, recognize that non-licensees are competitors of their underlying carriers. In particular, the Commission should not place E911 compliance by non-licensees under the control of CMRS licensees because non-licensees are subject to different market conditions, customer requirements and operational issues. Non-licensees' customers are distinct from those of the underlying facilities-based carriers. If licensees are permitted to dictate the compliance of their wholesale customers, however, they

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<sup>13</sup> See *USF Order on Reconsideration*, at 6.

would effectively control the business model and operations of the non-licensees as well, which would be detrimental to competition in the wireless market and restrict customer choice. Therefore, non-licensees must be solely responsible for their own compliance with the E911 obligations.

Further, the Commission should prohibit facilities-based carriers from attempting to count their non-licensees' handset sales in satisfaction of the licensee's compliance requirements. This would be inconsistent with the Commission's policy of focusing first on compliance by national operators. Therefore, even before the completion of this docket, the Commission should issue an immediate interim order confirming the separate treatment of licensees' and non-licensees' compliance.

#### IV. CONCLUSION

By voluntarily filing an ambitious E911 compliance schedule, VMU has demonstrated its commitment to the Commission's goal of ensuring the availability of E911 service to as many consumers as possible. VMU believes that the public interest requires that all wireless resellers be subject to similar E911 compliance schedules based on that applicable to Tier III CMRS licensees. Further, VMU respectfully requests that the Commission make immediately clear that where a non-licensee and its underlying licensed carrier are not under common control, the facilities-based carrier is not responsible for the non-licensee's compliance with E911 requirements adopted in this proceeding, and that because non-licensees' handset sales do not count for or against underlying carriers' compliance requirements, CMRS licensees have no role in ensuring E911 compliance by non-licensees.

Respectfully submitted,



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